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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 25

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

No. 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, *Petitioner,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONERS FREDERICK T. ZUBER, ET AL.

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REPLY BRIEF FOR THE PETITIONERS FREDERICK T. ZUBER, ET AL.

Through this reply, Petitioners Zuber, et al. seek to point out seriously erroneous factual premises relied upon by Respondents which have resulted in an analysis by them of the history and economic aspects of milk regulation in the Massachusetts-Rhode Island

market bearing little resemblance to the actual situation. Respondents' factual errors have also given rise to crucial fallacies in their analysis of the meaning of the Act, which also require correction.

At the outset, however, two more general characteristics of Respondents' brief require comment. First, Respondents make extensive use of factual assertions which either are devoid of record support or record citation or which fail to support their assertions.[1] Second, Respondents liberally employ selective excerpts from materials not of record before any court or from records in other cases not before this Court either to substantiate their own position or collaterally to attack the decisions of other courts relied upon by Petitioners on brief.[2] In this regard Respondents have

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[1] Respondents' frequent citations to pp. 657-736 of the Appendix are to non-record materials as noted on the blue page preceding page 657. See also footnote 98, p. 61 of Brief for Petitioners Zuber, et al. filed June 27, 1969. Respondents also make a number of allusions to alleged improper actions by Petitioners and their counsel in the course of this case. In keeping with the mandate of Rule 40(5) of this Court's Rules that briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter," no attempt is made here to respond *seriatim* to the personal attacks on opposing counsel and others by Respondents on brief. Petitioners simply deny flatly those aspects of Respondents' version of the facts which give rise to these attacks.

[2] To cite but two illustrations of these collateral attacks on other judicial decisions, Respondents, at pp. 140-141 of their brief, set forth correspondence involving Reuben Hall, Esquire, who testified in the *Cranston* case. *Cranston* v. *Freeman*, 290 F.Supp. 785 (N.D.N.Y.) appeal docketed Nos. 32,793-99 (2d Cir. Oct. 28, 1968). This correspondence, never a matter of record before any court, was apparently selectively extracted from files at the National Archives in an attempt by Respondents to impeach collaterally minor facets of the *Cranston* testimony of Mr. Hall. Other correspondence in the same National Archive files, however, demon-

also extensively referred to the administrative and judicial record (not before this Court) in the case of *Blair* v. *Freeman*, 370 F.2d 229 (D.C. Cir. 1966). As Respondents have admitted elsewhere, however, that case "involves a different administrative record and decision of the Secretary of Agriculture."[3]

A. Factual Errors

Much of Respondents' brief is devoted to their proposition, not passed upon by either court below, that the nearby differential adjustment is economically unsound. That proposition is based on a plethora of economic suppositions and misstatements leading to factual and legal conclusions contrary to those of the Secretary consistently and correctly reiterated and relied on over the years. Congress wisely left to the Secretary both the comprehension of the economic forces in milk markets and the authority to devise regulatory techniques "to establish and maintain . . . orderly market conditions." § 2 of the Act.

1. At frequent intervals throughout Respondents' brief, they point to the nearby differential provision of the Secretary's 1964 Massachusetts-Rhode Island Order and the Order itself as effecting a drastic change in

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strates conclusively that Mr. Hall's testimony is fully supportable. At p. 98 of their brief, again in an effort collaterally to impeach the testimony of witnesses in the *Cranston* case, reference is made to materials which were not a matter of record before that court since their authenticity had never been established. Respondents' use of such material here is particularly troublesome in that they also improperly attempt to relate it to the substantive issues before this Court.

[3] See *Response of Russell Allen, et al. In Nature of Objection to Lorton Blair, et al. for Leave to File a Brief Amicus Curiae*, filed by Respondents with this Court on September 11, 1969.

the economics of the marketplace and in the mix of nearby and distant producers serving New England markets. For example, the 1937 Boston Order is compared by Respondents with the 1964 Order, giving rise to the assertion that:

> "[T]he cost as recently as 1962 was 3 cents per cwt. but has increased 400 percent under the consolidated Order." (p. 8).

This and similar statements by Respondents also suggest that the rate of the nearby differential drastically changed between 1937 and 1964. In fact, the nearby differential has been maintained at precisely the same 46¢ and 23¢ per cwt. levels since 1937 as part of the regulated pricing structure established by the Secretary (R. 645, 255, 230-31, 305, 349-357). Moreover, a differential of approximately the same amount was paid by handlers to nearby producers as far back as the 1920's (R. 263-269, 277-288, 299, 635-637), throughout the period before federal regulation under agreements negotiated by farmer cooperatives with handlers in a free market, and under the pre-1937 licenses and early marketing orders of the Secretary. *Cranston* v. *Freeman,* 290 F. Supp. at 800, 814. During the 1930's this 46¢ differential adjustment represented approximately 25% of the milk price received by nearby farmers (R. 463, 366-67). Now, however, the same 46¢ differential represents less than 8% of the milk price received by such farmers. Thus, the differential has not increased but has proportionately shrunk.

Respondents' assertion that the 1964 consolidation order imposed a new economic burden on distant farmers because of the continuation of the nearby differential adjustment (at an identical rate) is patently

erroneous. The consolidated markets enjoyed far higher fluid milk sales than was true of the predominant Boston market before consolidation. As a consequence, on an average during the 12-month period following the 1964 Order, each distant farmer serving the Boston market actually pocketed 3¢ more per hundred pounds of milk than in the 12-month period immediately before the Order took effect. This favorable increase in returns to distant farmers, after taking into account the same nearby differential, had been forecast at hearings before the Secretary (R. 360-65). Presumably, this economic benefit motivated the distant farmers, comprising over two-thirds of those in the market (R. 55), to join their nearby counterparts, in approving the Order by a vote of over 89%.[4]

Respondents similarly claim (p. 133) that the number of nearby farmers increased drastically under the 1964 Order when compared to those serving the Boston market in 1937 and that substantial numbers of farmers whose farms had never been classified as nearby just prior to 1964 were added to the nearby group by the 1964 Order. Both claims are false. The first compares two discrete marketing areas. The increase in nearby farmers from the 1937 Boston Order to the 1964 Massachusetts-Rhode Island Order stems from the 1964 consolidation of three other secondary markets, largely served by nearby farmers, with the Boston market served primarily by distant farmers. Neither the Secretary nor the nearby farmers enlarged their

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[4] 29 Fed. Reg. 12237 (1964). Statistics regarding the blend prices for distant farmers are based on the Market Administrator's published price statistics for the 12-month period preceding October 1, 1964, the date of the 1964 Massachusetts-Rhode Island Order and for the 15-month period thereafter.

class over the years; they simply were grouped together along with the markets they served under one regulation, just as all distant farmers serving the same markets were consolidated. Moreover, the number of nearby farmers immediately before and after the 1964 Order were essentially identical although a procedural change in the manner of fixing the nearby area, from airline arcs to comparable geographical locations, did effect a minuscule change. As the Secretary noted in his 1964 decision (R. 356), nine nearby Boston producers who previously had farms located in the 23¢ area for Boston were shifted to the 46¢ area and one lone farmer who had not previously been located in any differential area was shifted to the 23¢ zone.

Respondents also suggest that the nearby differential's inclusion in the 1964 Order served as a stimulus for production increases by nearby farmers causing unstable and disruptive marketing conditions. The Secretary confronted a similar unsupportable allegation in hearings preceding the 1964 Order and pointed out in his decision (R. 351) that, despite the presence of the nearby differential in the Boston and secondary markets before 1964, increases in milk production in both nearby and distant areas followed almost identical trends. See also p. 10, *infra*. The correct inference is thus exactly the opposite of that drawn by Respondents; the nearby differential is entirely compatible with the economics of the market.

The facts of the matter thus are that the Secretary's 1964 Order changed neither the economics of the marketplace nor the mix of nearby and distant farmers serving the market, in consolidating the Boston milk market with the three contiguous secondary markets. Consolidation of the markets was necessary, as the

Secretary concluded, "to maintain orderly and efficient marketing in these areas." 29 Fed. Reg. 11206 (1964). The only direct economic impact on the farmers themselves was a small but significant increase in the financial returns to the preponderance of distant farmers covered by the Order who were serving the Boston market.

2. Respondents, at pp. 79-80 of their brief, dote on an assertion that a revalidation now of the Secretary's 30-year inclusion of the nearby differential in the Massachusetts-Rhode Island Order would "open the floodgates to the issuance of similar discriminatory differentials in virtually every milk order across the country" and "would precipitate cut-throat competition leading to disorderly marketing." This *in terrorem* rhetoric misses the mark in a number of respects.

First, the Secretary for over 30 years has employed the differential discriminately and in large metropolitan areas only, in each case in order to achieve orderly marketing and with undisputed success.[5] Second, in other markets, those away from areas dominated by competing, heavily urbanized population concentration, where relatively nearby supplies provide sufficient milk for fluid needs at all times, the Secretary has relied on other mechanisms, such as individual handler pools or more rigorous quantity controls on those handlers

[5] Respondents elsewhere suggest on brief (p. 6) that the differential provision is a most unusual regulatory provision. The facts are that, shortly before the 1966 decision of the court below in *Blair* v. *Freeman*, 370 F.2d 229, close to 50% of federally regulated milk was governed by orders containing the differential, including Chicago, New York-New Jersey, Massachusetts-Rhode Island and Connecticut. See USDA Statistical Bulletin No. 403, FEDERAL MILK ORDER MARKET STATISTICS, ANNUAL SUMMARY FOR 1966 (1967), pp. 22-23.

eligible to be covered by his orders, all in order to preserve a steady and reliable source of supply from nearby farmers in keeping with the most economic operations for the milksheds.[6] Third, Congress vested the Secretary alone with the authority to devise milk orders which would "establish and maintain orderly marketing conditions." Where the Secretary has employed the nearby differential adjustment as one integral facet of his regulatory mechanisms for milk, he consistently has concluded that orders including the differential will achieve this purpose.[7] Fourth, distant farmers, comprising a heavy majority of total farmers in the market, repeatedly have voted the Secretary's orders including the nearby differential into effect, demonstrating their positive acquiescence in the validity of the Secretary's conclusions. Respondents attempt to dismiss the crucial significance of these affirmative votes by alleging (e.g. pp. 143-144 of their brief) that with respect to the differentials "few dairy farmers in non-nearby areas were even aware of their existence." Yet, at the same time, Respondents stress

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[6] All economic studies employed by the Secretary over the years and milk marketing treatises, including all those cited by Respondents, e.g. Benedict & Stine, THE AGRICULTURAL COMMODITY PROGRAMS, 485 (The Twentieth Century Fund, 1956), have uniformly agreed that optimum and most efficient milk marketing economics require that fluid milk requirements be obtained from areas adjacent to the market and milk for manufacturing purposes be processed in the distant areas of the milkshed. (See R. 495, 505.)

[7] Concomitantly, the Secretary has concluded, e.g. in 1964, that opponents of the differential have not established that retention of the nearby differential adjustments "are resulting in unstable or disruptive marketing conditions which warrant their deletion" (R. 351). In his 1964 decision, he also concluded that "an unwarranted decrease in returns to nearby producers would result" from a reduction in the nearby differential (R. 352).

on brief (e.g. pp. 133, 163) repeated protests against the differential filed with the Secretary by distant farmers and cooperatives and other organizations of which they are members.[8] Respondents may not have it both ways, alleging, on the one hand, obliviousness to the differentials by distant farmers to escape the legal consequences of their votes favorable to the differential while, on the other hand, relying on repeated, but insubstantial, distant farmer objections to the differentials in every pertinent administrative hearing over the years to show that many distant farmers have continuously aired their complaints in hearings before the Secretary.

As supposed proof of their prognostications of doom if the nearby differential is maintained, Respondents refer in various filings to an attrition between 1965 and 1966 in the number of distant farmers, larger than that of the nearby farmers, serving the market, which they claim results from the differential.[9] These references are distortions of published statistics of the Milk Market Administrator (MILK MARKET STATISTICS, published annually by the Market Administrator for the Massachusetts-Rhode Island Milk Market). Since the trend throughout all portions of the milkshed is to larger farms, the only accurate gauge of economic dislocation is that which measures the share

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[8] Not only have distant farmers and their organizations availed themselves of all opportunities before the Secretary to condemn the differential, thus demonstrating their awareness of it, but the Market Administrator in his publications circulated directly to all farmers has commented upon it at length (R. 642).

[9] See, e.g. pp. 2-3 of Brief of Respondents in Opposition to Joint Brief Amicus Curiae of the Attorney Generals (sic) of Massachusetts, Rhode Island and Connecticut.

of the market by volume of milk produced as well as by producers, as follows:

State	1965		1966		1968	
	Avg. No. of Prod.	Mkt. Share by Volume	Avg. No. of Prod.	Mkt. Share by Volume	Avg. No. of Prod.	Mkt. Share by Volume
Massachusetts	1603	17.1%	1461	16.9%	1233	14.4%
Rhode Island	244	2.8%	217	2.7%	188	2.1%
Vermont	5111	50.7%	4405	49.8%	4135	47.9%
New York	981	11.9%	1007	13.4%	1448	18.4%

As these figures reflect, Vermont farmers have lost only 5.5% of their share of the market. Massachusetts farmers have lost 15.8% of their share while Rhode Island farmers have lost 25.0% of their share from 1965 to 1968. More significantly, the share of distant New York farmers has risen from 11.9% to 18.4%, an increase of more than 54.6% and strong evidence that prices for distant farmer milk under the Massachusetts-Rhode Island Order are sufficiently high to have caused a steady and substantial shift of New York milk into the market. The above tabulation also reflects that, from 1965 to 1968, the attrition in the number of Massachusetts and Rhode Island farmers was about 23%; but in Vermont farmers, less than 20%. In this same period, the number of New York farmers increased by 467, or more than 47%.

3. Respondents rewrite history in suggesting that it was primarily nearby farmers who sought federal regulation at the outset, allegedly because they were losing their markets. Respondents also assert, without record support, that "improvements in roads and motor transportation in the early 1930's . . . virtually eliminated the preferential position of the nearby producers" (p. 22) and "made distant milk accessible to even the smaller dealer" (pp. 23-24).

The facts are otherwise. Farmers from all four states serving the Boston market actively sought means to stabilize the Boston milk market after fluid milk prices declined there in 1930.[10] Joint action was initiated first by the Commissioners of Agriculture in the States of Maine, New Hampshire, Vermont and Massachusetts who formed the New England Milk Board in 1930 and thereafter by the Governors of these four states through the Governors' Dairy Advisory Board which actively participated with the AAA in drafting the first license for the Boston market. That license (in Exhibit D) included a preferential base rating for nearby farmers.[11]

The 1936 and 1937 Boston Orders were urged upon the Secretary by all affected states and by both nearby and distant farmers, some nearby farmers indicating at administrative hearings that unless a nearby differential adjustment were included they would prefer no federal order (R. 279, 304). Governor George Aiken of Vermont evidenced the concern of Vermont distant

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[10] Contrary to statements in Respondents' brief (pp. 24-25), cooperatives were effective in maintaining stable prices in *the Boston fluid market* until 1930. See Record, *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, October Term, 1938, No. 772, Master's Report, pp. 103-109. The nearby price differential continued in effect after 1930 despite the overall price instability characterizing the market after 1930 (R. 287-288 showing price differences between nearby and distant milk in 1932).

[11] Record, *H. P. Hood & Sons, Inc., supra*, Master's Report, pp. 130-133. Respondents' contentions on brief (pp. 30, 91-92, 156) that the Massachusetts Milk Control Board extracted the nearby differential as the price for cooperating in enforcement of the Secretary's early licenses (Nov. 1933, March 1934) is false. The Board was not created until July 1934. See Chap. 376, 1934 Acts of the Commonwealth of Massachusetts.

producers in preserving the Boston Order, telegraphing Congress to secure prompt passage of the 1937 Act.[12]

Respondents attempt at some length on brief (pp. 88-91) to rehabilitate the lower court's unsupported speculation (R. 209, n. 36) that nearby farmers were impelled to seek federal regulation because bulk tank trucking made distant milk directly accessible in the 1930's. They, however, misconstrue the facts as did the court below. It was not the use by handlers of bulk tank trucks from country to city plants that permitted distant farmers to deliver directly to the city but the installation of bulk tanks at the farms. As Respondents admit, bulk tank installation on the farms was a much more recent phenomenon. What Respondents and the lower court failed to realize, perhaps understandably in view of the intricate complexities of milk marketing economics, is that distant farmers generally were not able in the 30's to deliver their milk directly to the city because they and their handlers were still using cans to transport the milk *to the country plants,* and that this same situation was still continuing in part as recently as 1964. 29 Fed. Reg. 11211 (1964). The transportation problem for the distant farmers throughout the years centered on getting their milk to the handlers in the absence of farm bulk tanks and in view of poor road conditions. The solution was country plants because direct delivery

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[12] Governor Aiken's telegram stated:

"Passage of Marketing Agreement Amendment apparently only hope for 15,000 Vermont dairymen. Situation critical and haste needed." 81 Cong. Rec. 4964 (1937).

from the farm to the cities over long distances and using milk cans was not economically feasible or practical. Even today with bulk tanks on the farms, nearby farmers situated near or on major highways and close to city plants still retain an advantage over distant farms on country roads. While the measure of accessibility between nearby and distant farmers may have narrowed, it has not disappeared. To the extent that modern transportation improvements and the placement of bulk tanks at the farms have lessened the advantages of nearby milk, that consideration has, in effect, been reflected in the relative decrease in value of the nearby differential over the years (R. 463).

Respondents recite (pp. 63-68) portions of the Secretary's decisions relating to unsettling conditions in the secondary markets, e.g. Southeastern New England and Springfield, immediately preceding federal regulation (R. 332, 336, 341) in a further attempt to show that it was the nearby farmers alone who sought such regulation and that handlers were unwilling to pay a higher price for nearby milk under free market conditions. They are wrong on both counts. All farmers marketing in the secondary New England markets just prior to regulation were experiencing destructive competition similar to that initiated by handlers in the Boston market in the early 30's before federal regulation. A committee of milk experts including spokesmen for the Vermont dairy industry, in considering these problems, unanimously found that the effects of unregulated milk supplies in these secondary markets were equally as destructive on the distant northern farmers as on the nearbys and that federal

regulation was required to protect and assist both groups.[13]

As to the prices paid by handlers to nearby farmers in these markets, the evidence before the Secretary showed that customarily a premium price had been paid to them for their milk.[14] Shortly before federal regulation, however, problems, largely independent of this premium, developed in these markets. State regulatory agencies which had controlled the prices for state-produced milk since the 30's, but were legally barred from regulating out-of-state milk,[15] had prescribed individual handler pools and high fluid milk or Class I prices for milk sold by in-state producers.

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[13] The 1949 report of this committee, the New England Regional Milk Price Committee, composed of 12 milk specialists stated:

"EFFECT OF UNREGULATED MILK—NORTHERN NEW ENGLAND

"The problem of unregulated milk also has destructive effects on producers in northern New England.

"The problem for northern New England producers not under Federal regulation is that as the Boston blend price is reduced by increased surplus in that market the price offered for their milk will decline correspondingly. The chain of cause and effect here is that as their milk displaces the milk normally going into secondary markets, the Boston surplus is increased. As the Boston surplus increases, the Boston blended price drops. Since the price paid for unregulated milk outside the Boston pool depends on the Boston blended price, the price for such unregulated milk also falls."

Exhibit 5, Hearings before the Secretary on the 1949 Springfield Order, the decision for which appears at 14 Fed. Reg. 7085 (1949). This report and all other portions of the administrative record for the Springfield record were not submitted to the lower courts.

[14] Tr. 463-466, Exhibits 9 and 10, Springfield hearings (Docket No. AO 205); Tr. 634-641, Exhibits 16 and 25, Worcester hearings (Docket No. AO 204). Again, these administrative records were not before the lower courts.

[15] *Baldwin* v. *Seelig*, 294 U.S. 511 (1935).

For example, in 1958 farmers located in Rhode Island were paid a price of $1.60 or more per hundredweight over the blend price in the Boston market at the 20th zone (R. 622). This resulting price spread, even after allowing for transportation and handling costs, was far in excess of the value of nearby milk which customarily in the Boston market enjoyed a premium of only 46¢. Consequently, some handlers serving the secondary markets reached out for unregulated, out-of-state distant milk purchasable at or near the Boston blend price which was cheaper by $1.60 or more per hundredweight. Handlers buying this distant milk thus avoided paying the class prices established by state agencies and those established by federal regulation in the Boston market. Instead, these handlers bought at a price comparable to the Boston blend price and resold the milk almost exclusively for fluid use without paying the higher fluid use Class I prices established by state and federal regulation. The results were larger profits for the handlers and a loss of Class I values for the farmers. Thus, the problems were largely caused by the intermix of unrealistic state regulation with adjoining federal regulation, together creating unnatural economic results. The Secretary's remedy was to restore the situation and the returns to all farmers "more nearly in line with their prospective returns without marketwide equalization" for the benefit of both distant and nearby farmers. 23 Fed. Reg. 8238 (1958).

4. A central theme of Respondents' brief is that the economic values of nearby milk reflected by the nearby differential never in fact existed, are no longer viable or are improper for recognition under the statutory scheme. For example, Respondents (pp. 40, 51, 113)

point to "evenness of production" which generally characterizes nearby, but not distant, milk currently, as well as before and after federal regulation commenced, and alternately contend that this economic value either is not really meaningful [16] or is otherwise rewarded by the Secretary. Whether or not evenness of production is an important economic value for the market is a matter for the Secretary, as is the determination of how and by what measure the Secretary encourages and rewards it. Respondents argue that a change in the regulatory scheme in 1967, "the seasonal incentive plan," [17] compensates the nearby farmers sufficiently for their greater evenness. The short answer is that this device was first employed in the market in 1967, after this suit was commenced and the nearby differential escrowed, and was not a portion of the 1964 Massachusetts-Rhode Island Order under re-

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[16] Outside milk experts have concluded otherwise. Thus, the New England Regional Milk Price Committee in their July 1949 report, footnote 13, *supra*, unanimously agreed upon six standards for federal milk regulation, one of which they stated to be:

> "3. *Equality of prices to producers.* Prices paid to producers should vary only to reflect differences in the actual value of their milk. These differences depend on (a) quality of the milk; (b) butterfat test; (c) transportation costs; (d) *evenness of seasonal production;* and (e) *actual economic advantages of location near the market.* Prices to producers supplying secondary markets should be kept in line with prices to producers supplying primary markets. In order to maintain such equality in pricing, it is necessary to establish a method of pooling which includes all of the producers who supply that market or markets." (Emphasis added.)

Dr. Thurston M. Adams, University of Vermont, and E. Frank Branon, Chairman, Agricultural Committee, Vermont House of Representatives, 1948-49, were members of this Committee who shared in its unanimous view.

[17] 32 Fed. Reg. 5288 (1967).

view here. More importantly, this incentive plan (as its name implies) provides an incentive for uneven farmers, primarily those distant from the market,[18] to become more even and tailor their production more closely to market needs. It does not serve to recognize, as does the nearby differential, the contribution already made by those historically and currently more even nearby producers who have incurred large expense and effort in tailoring their production to market needs.[19]

In decrying the economic advantages of nearby milk, Respondents also pass over without comment or reply the fact that the Vermont Milk Control Board has employed a nearby price differential adjustment for nearby farmers in their own state orders,[20] a fact also

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[18] The continuing significant disparity between nearby and distant farmers in attaining evenness of production is shown in the published annual statistical reports of the Market Administrator for the Massachusetts-Rhode Island market:

SEASONALITY IN DAILY AVERAGE OUTPUT OF PRODUCER MILK BY VARIOUS PRODUCTION ZONES

(Percentage by which high month exceeds low month)

(Per farm basis)

	Nearby Area	Distant Area	Zone 21	Zones 22-27
1965	15.9	26.5	36.0	55.1
1966	14.7	31.5	32.6	58.7
1967	13.8	32.7	47.5	59.8
1968	14.2	28.1	41.5	61.1

Source: MILK MARKET STATISTICS, published annually by the Market Administrator for the Massachusetts-Rhode Island Milk Market.

[19] The Secretary also recognized this value of the milk of nearby farmers as one factor justifying the nearby differential. 32 Fed. Reg. 9919 (1967).

[20] See footnote 110 at p. 68 of Petitioners' main brief herein. See also 32 Fed. Reg. 9904 (1967).

ignored by the Attorney General of Vermont in his brief amicus curiae here. Vermont would obviously like it both ways: a premium price to Vermont nearby farmers marketing in Vermont; and a higher price than now available to Vermont distant farmers marketing outside Vermont in competition with nearby farmers of other markets.

Throughout their brief, Respondents' predicate for their economic suppositions ignores the basics of milk marketing. The most economically efficient milkshed is reasonably compact with ample nearby sources of supply. In a free market, competitive forces tend to create a fluid milkshed that conforms to the most economically efficient patterns. Milk, a bulky and perishable product, is difficult and expensive to transport. To maximize efficiency the more distant milk should be manufactured in the country into milk products, and the nearby milk employed in the fluid market because transportation costs will then be minimal.[21] To manufacture nearby milk and transport

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[21] Respondents, in their Brief in Opposition to the Joint Brief Amicus Curiae of the Attorney Generals (sic) of Massachusetts, Rhode Island and Connecticut, liberally quote (at pp. 18-23) from the so-called Nourse Committee Report, incorrectly suggesting, however, that 16 of the 17 members were unanimous in their views regarding the nearby differential. In any event, in that portion of the Report on which all agreed, they stated:

> "In addition, we are concerned with maintaining as high a degree of efficiency as possible in the organization of the milkshed. This can only be achieved where the fluid milk requirements are obtained from areas immediately adjacent to the market, so that surpluses will be processed into the more concentrated manufactured dairy products in the outlying areas of the milkshed, thus minimizing total transportation costs.
>
> "We recognize that procedures which provide transportation differentials exactly equal to differences in actual transporta-

distant milk to the consumers' doorstep is economically wasteful, and the incremental cost ultimately will result in higher prices to the consumer.

Government regulation establishes an insulated market structure. Unless the Secretary employs techniques to substitute for normal competitive market forces, the handler has no incentives to maximize efficiency. The individual handler, under marketwide pooling (§ 8c(5)(B)(ii) of the Act), is required by the Order to pay the same net price for milk, no matter how near or far the farmer is from the market, how efficient the producer may be in meeting the requirements of the fluid market,[22] or how effective the handler and his producers may be in balancing supply with market needs.[23] The result is that a marketwide pooling order, with classified pricing but only adjustments for transportation costs, has an artificial expansionist effect which is economically inefficient. The nearby differential adjustment tends to minimize this artificial ex-

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tion costs may be inconsistent with the objective of minimizing total transportation expenses, since such a system tends to make the handler indifferent to the location of producers of his fluid milk supply."

See also J. D. Black, THE DAIRY INDUSTRY AND THE AAA, 217, 219 (Brookings Institute 1935).

[22] Under an order, without any adjustments in price except for transportation costs, the even and uneven producer would be paid the same price per hundredweight.

[23] The handler who works with his producers to establish a milk supply equal to his fluid requirements and thus obtains a high fluid or Class I utilization retains none of the benefits of the efforts of himself and his producers, for he must pay into the producers settlement fund the difference between his higher utilization and the marketwide utilization factor, the value of which accrues to producers of handlers who may have been less effective in balancing supply and demand.

pansion just as does a free and unregulated market, while at the same time recognizing the extra economic values of nearby milk.[24]

B. Erroneous Legal Analysis

Stripped to their essentials, Respondents' lengthy arguments regarding the legal validity of the nearby differential adjustments under the Act appear to distill into three propositions. One, Respondents claim the core of the Act was an intent by Congress to prevent one or more producers supplying the same market from receiving different prices than those of other producers supplying that market, based in any degree on different use patterns of the milk marketed. Two, Respondents contend that the differentials are not authorized by the statutory language "market . . . differentials customarily applied" presumably because the only differential adjustments Congress intended to cover by this statutory phrase were differentials reflecting savings in double handling costs when farmers shipped milk directly to city plants rather than through country stations. Three, in any event, Respondents contend, the differential was not customarily applied by handlers prior to passage of the 1935 and 1937 Acts or to the extent that it was applied in either a free market or under earlier federal regulation, it was illegal. Respondents base their contentions on erroneous conjecture, tortured reasoning and inaccurate and unsupported factual premises.

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[24] See pp. 61-80 of Brief for Petitioners Zuber, et al. filed June 27, 1969. Respondents' attack on state regulatory practices with respect to the Connecticut marketing area is undercut by the simple fact that approximately 50% of the Connecticut market's supplies are received from regular registered producers located outside the state, most of them in New York.

1. *The Core of the Act.* Contrary to Respondents' views, the core of the Act lies not in the mechanical aspects of marketwide pooling but in the grant of authority to the Secretary to stabilize milk markets and promote orderly marketing conditions, thereby assuring parity prices to farmers and an orderly flow of supply to the market. § 2 of the Act, "Declaration of Policy." To implement this mandate the Secretary is authorized to set parity prices for dealers to pay and farmers to receive for milk sold by the latter to the former. § 8c(5) of the Act. The Secretary's authority embraces not only the power to establish these prices but also to identify the farmers or group of farmers that are to receive them. The Secretary is free to define these producers by regional production areas, by regional marketing areas, by fluid milk markets, by manufactured milk markets or by any combination of these that he determines to be most appropriate for orderly marketing, §§ 8c(9) and (11); provided always that he obtains the concurrence of the farmers, who are entitled by vote to adopt or reject his order.

The provisions of the Act themselves underscore that Congress did not intend to prohibit differences or adjustments in prices between farmers whose milk was priced under the Act or under its marketwide pooling provisions even though such differences might in some way have been related to differing use patterns of the milk being marketed.[25] The presence of § 8c(5)(B)

[25] Respondents' argument that unvarying *equality* was the congressional goal is not even supported by their citations; e.g. the Economic Brief of the USDA quoted at pp. 54-55 speaks of equity rather than equality and specifically supported inclusion of the nearby differential (R. 274-275). Respondents refer to, and quote extensively from, the decision of this Court in *Rock Royal*, but that

(ii)(d) in the statute expressly permitting the Secretary to employ base-rating plans is conclusive evidence in point and demonstrates the error of the construction placed by Respondents and the court below on the "irrespective of the uses . . ." language of the Act to reject the nearby differential adjustments.

Under explicitly authorized base-rating plans the Secretary is able "equitably to apportion" milk pool proceeds among farmers on the basis of sales advantage for fluid use. Thus, as Respondents admit on brief (p. 39): "the producer is paid the Class I or fluid milk price for all milk delivered within his 'base'." Since these bases must vary among farmers in accordance with the typically varying levels of evenness of production of individual producers, an unequal distribution of Class I fluid milk sales necessarily results. Since the Act does not authorize any collection of added funds from handlers where base-rating is employed, the differing returns to farmers must be paid from the equalization pool. Thus, in base-rating as in customarily applied nearby differentials Congress rejected any notion that strict equality was the watchword and that an unequal division of the fluid milk

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opinion emphasized that no "exaggerated equalization" was intended by the Act. This Court pointed to the "usual market variations" expressly authorized by the Act, 307 U.S. at 571, 572, and specifically upheld the "nearby differential" of the New York Order, 307 U.S. at 567. The Respondents quote language from the *Lehigh* decision of this Court. *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (1962). It speaks not of unwavering equality but of "a proportional share" of the different use markets for each producer (370 U.S. at 81). Respondents' citations do not constitute support for their strained construction imposing rigid equality among the farmers regardless of the equities and the differing contributions to the market made by discrete groups of farmers.

market among farmers was prohibited. On the contrary, arrangements of this nature were specifically permitted under the Act.[26]

The close association of base-rating plans with historic and potential fluid milk patterns likewise destroys the myth which the court below initiated and which Respondents attempt to perpetuate—that any adjustments in farmer returns which are related in any manner to such patterns are flatly prohibited by the Act. Base-rating plans are directly concerned with and premised on such patterns. The bases of individual farmers are fixed in relation to a prior period, and to a low marketwide production point in that period when supplies are consequently lower. Those farmers who have supplied the fluid milk market with significant production at this low point are provided bases for their efforts which reward them with a larger proportion of the handlers' higher Class I price pool payments resulting from these handlers' fluid milk sales throughout the year. Again, this reward is directly tied to the historic and prospective fluid use of the milk received from the more efficient and more even farmers in the market and necessarily

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[26] The individual farmer referendum requirements now relating to base-rating which Respondents cite (p. 40) as a stricture on the Secretary's authorization here did not become part of the statutory scheme until 1965. 79 Stat. 1187. Before then, base-rating was subject to the same procedures as any other portion of a milk order. Respondents thus miss the point which is not what Congress intended in 1965 as to base-rating but rather the congressional intent in 1935 and 1937 as to the Act's "irrespective of uses" language. Had Congress been disenchanted with the nearby differentials in 1965 when they applied in orders for between 40% and 50% of federally regulated milk they were free to circumscribe the Secretary's authority pertaining to them in the same manner as they did with respect to base-rating plans.

reduces the returns to the less efficient and less even farmers.[27] Handlers do not bear the cost of this reward, for the benefits which it reflects in a regulated format are to the market as a whole and not to the individual handlers themselves. Respondents' contentions that the extra economic values of nearby milk should be left to the individual handlers to reward on an unregulated basis thus are as specious in connection with the nearby differential as they would be for base-rating.

2. *The Nearby Differential as a Market Differential.* Respondents' arguments on this point reflect a serious dilemma from which they are unable to extricate themselves. Faced with 30 years of consistent administrative construction and judicial interpretation that the nearby differential is a market differential adjustment under the Act, they place absolute reliance, not on the words of the Act themselves, but on their own interpretation of a selective excerpt from congressional Committee Reports for the 1935 Act, while ignoring the remainder of those reports, which repeatedly emphasize a congressional intent to "follow" the methods and practices of the cooperatives and the federal licenses issued under the 1933 Act. These Committee Reports speak of market differentials, which "vary with the markets" as those "given to the producer to compensate him for delivering his milk

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[27] Base-rating thus enables the Secretary to apportion milk pool proceeds in much the same manner and effect as does the nearby differential adjustments although the latter price adjustments reflect other extra values for the market as well. Against the background of his consistent use of the nearby differential adjustments in the Massachusetts-Rhode Island market, the Secretary has rejected a base-rating plan for that market (R. 359-360).

to a city market instead of to a country plant."[28] That, in fact, was precisely what nearby farmers did —they delivered their milk to a city market instead of a country plant in the 1930's and they do so today, for country plants are located far from the market's core and cannot economically be receiving points for nearby milk. (See n. 29, *infra* p. 26.) Thus, in upholding the nearby differential as a market differential in *Green Valley Creamery, Inc.* v. *United States,* 108 F.2d 342 (1939), the court there found that "[m]ilk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market," while the Secretary in his decision for the 1964 Order referred extensively to the continuing and widespread use of country plants, 29 Fed. Reg. 11210-211 (1964), which are the receiving points for the milk of distant farmers.

Respondents rely on differing arguments in an attempt to exclude nearby differentials from the Act's market differential language. They maintain (pp. 92-93) that the only "market differential" intended by Congress is the country station or direct delivery differential paid to farmers whose milk is transported directly to city processing plants rather than country receiving stations, thereby avoiding double handling costs. This is currently provided for in the Massachusetts-Rhode Island Order as a portion of the zone differential (R. 347-49). But this differential, which the court below cited solely as an authorized "example" of a market differential (R. 209), does not fully comport with the Committee Reports' explanation of mar-

[28] H.R. Rep. No. 1241, 74th Cong., 1st Sess. 11 (1935). The Reports also state that "market differentials are usually paid in secondary markets."

ket differentials as those "usually paid in secondary markets" since in the 30's secondary markets were simply not served regularly by country plants.[29]

Perhaps recognizing this anomaly, Respondents go on to assert (pp. 21-22, 93) that an obscure differential existing in the upstate New York secondary markets in the pre-federal regulation years of the 1950's and for some years under the Secretary's 1957 New York-New Jersey milk order also was a market differential and presumably one which Congress had in mind in writing the 1935 Act. While Respondents suggest that this differential also was intended to recognize savings in handling costs, that is not the case. As the Secretary made clear in his decision, 22 Fed. Reg. 4212-16 (1957), this differential, in the form of a price premium, was "paid by local dealers in Upstate New York . . . to obtain the milk they want." In short, dealers were offering a premium, not for savings in handling costs, but in recognition of their proximity to competing markets. As Respondents acknowledge, this differential qualifies as a market differential despite Respondents' error as to its underlying basis.

Respondents also recognize (pp. 104-105) a third variety of differential as qualifying as a "market differential": the cooperative payments differential of the 1937 Boston Order held in the *Green Valley* decision to be an authorized market differential. They attempt to hedge, however, by straining to show that this differential was really intended to reflect primarily the handling cost advantages of the country station differential. The cooperative payments differential

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[29] Record, *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588 (1939), Master's Report at p. 79; *Cranston* v. *Freeman*, 290 F.Supp. at 798-799.

however, related to a variety of marketing services supplied by cooperatives, just as the nearby differential, also affirmed as a market differential by the *Green Valley* court, compensated for a variety of extra economic values inherent in nearby milk.

Finally, Respondents deal with the differential of the New York Order before this Court in *Rock Royal*[30] (pp. 144-148). As Respondents concede, this was a differential payable primarily out of the equalization pool and not by handlers. Moreover, its payment to nearby farmers was in excess of country station handling costs and transportation costs and was not designed to reflect the cost of marketing services. While Respondents' discussion here is less than clear, they appear to accept this Court's holding that the differential there was an authorized one even though it reflected solely the extra values of nearby milk.

In sum, Respondents appear to acknowledge that at least four distinct differentials, each reflecting differing economic values, conform in substance to the "market differential" terminology, including the nearby differential at issue in *Rock Royal*. In this light, their rejection of the nearby differential adjustment of the Massachusetts-Rhode Island Order which likewise was customarily applied to reflect certain economic values is without foundation.[31]

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[30] *United States* v. *Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[31] Respondents' erroneous analysis of the market differential is further compounded in their discussion (pp. 113-114) of License No. 15 issued by the Secretary in 1933 for the Boston market. Respondents point to the provision of that license which provided an adjustment to those farmers whose milk on September 1, 1933 was being trucked directly from farms to plants located in the marketing area. In n. 79 at p. 114, Respondents then claim this

3. *Customary Application of the Nearby Differential.* Throughout their brief, Respondents attempt to cast doubt upon the customary application of the nearby differential adjustment in the Massachusetts-Rhode Island market. They present two different arguments. First, they claim (e.g. pp. 72, 112 and 116) that all differential adjustments which were the predecessors of the 1937 nearby differential adjustment were illegal. Thus, they assert (p. 72) that the 1936 Order differential was tainted with illegality. Again, they comment (p. 112) upon alleged illegality of the early base-rating provisions which were set forth in the Secretary's pre-1935 Boston licenses. But it is absurd to contend that the nearby differential could not have been customarily applied because at all times its forerunners were illegal. Not even the lower court went this far in its analysis.

Respondents' second line of attack flows from similarly unsupportable premises. They contend (p. 120) that no provision in form identical to the nearby differential adjustment of the 1937 Order preceded that Order, arguing also that since no marketwide pool antedated federal regulation, no nearby differential

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was both a direct delivery and a market differential. In fact, it was only the latter since a separate country station or direct delivery differential was provided in the license. As testimony in the hearing record makes clear (R. 447-449), the license provided a differential adjustment of $.7103 between country station and direct delivered milk to cover transportation cost of 44.78¢, a country plant handling allowance of 23¼¢ and 3¢ for can service. In addition, a special differential was provided in the license for those farmers, all nearby, who delivered directly to plants located in the marketing area. This differential adjustment was the forerunner of the present nearby differential provision and was designed to recognize the inherent economic advantages of nearby milk.

adjustment comparable to that adopted in the 1937 Order could have been customarily applied by handlers. Respondents refer to scattered testimony from various administrative hearings in which witnesses stated that handlers did not pay differentials as such but rather price premiums and that the adjustments were not made by adding them to base prices for distant milk but were instead a component of the higher prices paid to nearby producers (pp. 121-125 of Respondents' brief). The facts show that prior to regulation handlers simply paid nearby producers a higher price, approximately 46¢ in excess of that paid distant farmers, after taking into account transportation and handling costs (R. 263-269, 277-288, 299, 635-637). To deny that such higher prices were differentials "customarily applied" exalts form over substance. Respondents reflect an awareness of these higher prices paid nearby producers before federal regulation by labelling the statistics which demonstrate them as (p. 126) "artificial, inaccurate and illegal price statistics."

In a critical respect, however, Respondents fail to succumb to crucial factual errors in the lower court's analysis. The lower court erroneously assumed that the pre-1937 nearby differential adjustment was intended to reflect only transportation and handling costs and was never payable in excess of the differential paid to distant farmers who delivered their own milk directly to nearby plants (R. 204). Respondents attempt to bury this facet of the lower court's analysis, commented upon at length at pp. 51-52 of Petitioners' main brief, by placing an incomprehensible interpretation on it in an obscure footnote (p. 90, n. 68a) and then dismissing it as "of no great moment."

CONCLUSION

For the reasons in the main brief of Petitioners Zuber, et al. and in this reply brief, it is respectfully submitted that the relief requested in Petitioners' main brief should be granted.

Respectfully submitted,

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